

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE NEW YORK TIMES COMPANY, and JOHN T. EWING, JR.,	:	X
	:	
Plaintiffs,	:	
	:	
- against -	:	<u>COMPLAINT</u>
UNITED STATES DEPARTMENT OF JUSTICE,	:	
	:	
Defendant.	:	
	:	
		X

Plaintiffs THE NEW YORK TIMES COMPANY and JOHN T. EWING, JR., by their undersigned attorney, allege for their Complaint:

1. This is an action under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), to obtain an order for the production of agency records from the Department of Justice (“DOJ”) in response to a request properly made by Plaintiffs.

PARTIES

2. Plaintiff The New York Times Company publishes *The New York Times* newspaper and www.nytimes.com. The New York Times Company is headquartered in this judicial district at 620 Eighth Avenue, New York, New York.

3. Plaintiff John T. Ewing, Jr., is a reporter for *The New York Times* newspaper and an employee of The New York Times Company.

4. Defendant DOJ is an agency of the federal government that has possession and control of the records that Plaintiffs seek.

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B).

6. Venue is premised on the place of business of Plaintiffs and is proper in this district under 5 U.S.C. § 552(a)(4)(B).

7. Plaintiffs have exhausted all administrative remedies available in regard to the request at issue. *See* U.S.C. § 552(a)(4), (6).

FACTS

8. On December 10, 2018, Mr. Ewing submitted a FOIA request (the “Request”) to the Environment and Natural Resources Division (“ENRD”) of DOJ for the following records:

--A copy of all reports submitted to the Justice Department by the Monitor under the plea agreement in *United States v. Volkswagen*, No. 16-CR-20394 (E.D. Mich) and the Independent Compliance Auditor under *in Re Volkswagen “Clean Diesel,”* No. MDL 2672 (N.D. Cal.) and

--A copy of all “factual evidence” presented by Jones Day to the Justice Department as the term is used on page 295 of Volkswagen’s 2017 annual report. Of particular relevance are documents related to the involvement of members of Volkswagen’s executive board or supervisory board in the events described in the Statement of Facts in the above referenced plea agreement.

The Request also sought a fee waiver and asked for processing on an expedited basis.

9. On December 10, 2018, ENRD acknowledged receipt of the Request and began processing.

10. On December 18, 2018, ENRD issued a letter granting a fee waiver for the Request but denying expedited processing. ENRD also noted that because processing of the Request required “consultation with two or more agency components and may involve a search of voluminous records” – which, in ENRD’s view, constitute “unusual circumstances” within the

meaning of 5 U.S.C. § 552(a)(6)(B)(iii) – it was “unable to process [the] request within the 20-business-day limit specified in 5 U.S.C. § 552(a)(6)(A).” It provided no estimated completion date for the Request, but anticipated “requir[ing] more than ten additional working days.”

11. On December 20, 2018, counsel for Plaintiffs communicated with counsel for ENRD regarding the processing of the Request. Counsel for ENRD indicated that one of the documents sought in the Request – the report of the Independent Compliance Auditor – had been publicly released. She also indicated that the agency would continue processing of the Request as to another document: the Monitor’s report submitted to DOJ pursuant to a plea agreement. However, counsel for ENRD stated that the part of the Request seeking “factual evidence” presented by Jones Day to DOJ required “further clarification or narrowing.”

12. On December 26, 2018, Plaintiffs proposed narrowing the aspect of the Request seeking “factual evidence” presented to DOJ by Jones Day, identifying three discrete categories of documents:

- a. Documents regarding members of the Volkswagen management board and supervisory board, and particularly any statements by them or others in the course of the Jones Day investigation relevant to their possible involvement in the offenses that were part of the plea agreement. Those individuals are, specifically:
 - i. Ferdinand Piëch, former chairman of the Volkswagen supervisory board, member of the family that owns a controlling interest in Volkswagen.
 - ii. Wolfgang Porsche, member of the supervisory board, member of the controlling family.
 - iii. Matthias Müller, former Volkswagen chief executive.
 - iv. Martin Winterkorn, former Volkswagen chief executive.
 - v. Herbert Diess, Volkswagen chief executive.
 - vi. Rupert Stadler, chief executive of the Audi division, member of the management board.
 - vii. Hans-Dieter Pötsch (or Poetsch), chairman of the Volkswagen supervisory board.
- b. Any document or report that Jones Day prepared summarizing its findings.

c. Testimony or statements by any witnesses regarding a meeting attended by Martin Winterkorn, Matthias Müller and others on or about November 8, 2007, to discuss problems with the emissions control equipment of diesel cars to be sold in the United States.

13. On December 26, 2018, counsel for ENRD responded that the agency was “unable to continue processing the request” because of a lapse in appropriations.

14. To date, ENRD has not made a determination regarding the Request.

COUNT I

15. Plaintiffs repeat, reallege, and reincorporate the allegations in the foregoing paragraphs as though fully set forth herein.

16. DOJ is an agency subject to FOIA and must therefore release in response to a FOIA request any disclosable records in its possession at the time of the request and provide a lawful reason for withholding any other materials as to which it is claiming an exemption.

17. Plaintiffs have exhausted all administrative remedies under FOIA. *See 5 U.S.C. § 552(a)(4)(6).*

18. Accordingly, Plaintiffs are entitled to an order compelling DOJ to produce records responsive to the Request.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

19. Declare that the documents sought by the Request, as described in the foregoing paragraphs, are public under 5 U.S.C. § 552 and must be disclosed;

20. Order DOJ to provide the requested records to Plaintiffs within 20 business days of the Court’s order;

21. Award Plaintiffs the costs of this proceeding, including reasonable attorney's fees, as expressly permitted by FOIA; and
22. Grant Plaintiffs such other and further relief as this Court deems just and proper.

Dated: New York, New York
February 14, 2019

/s/
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